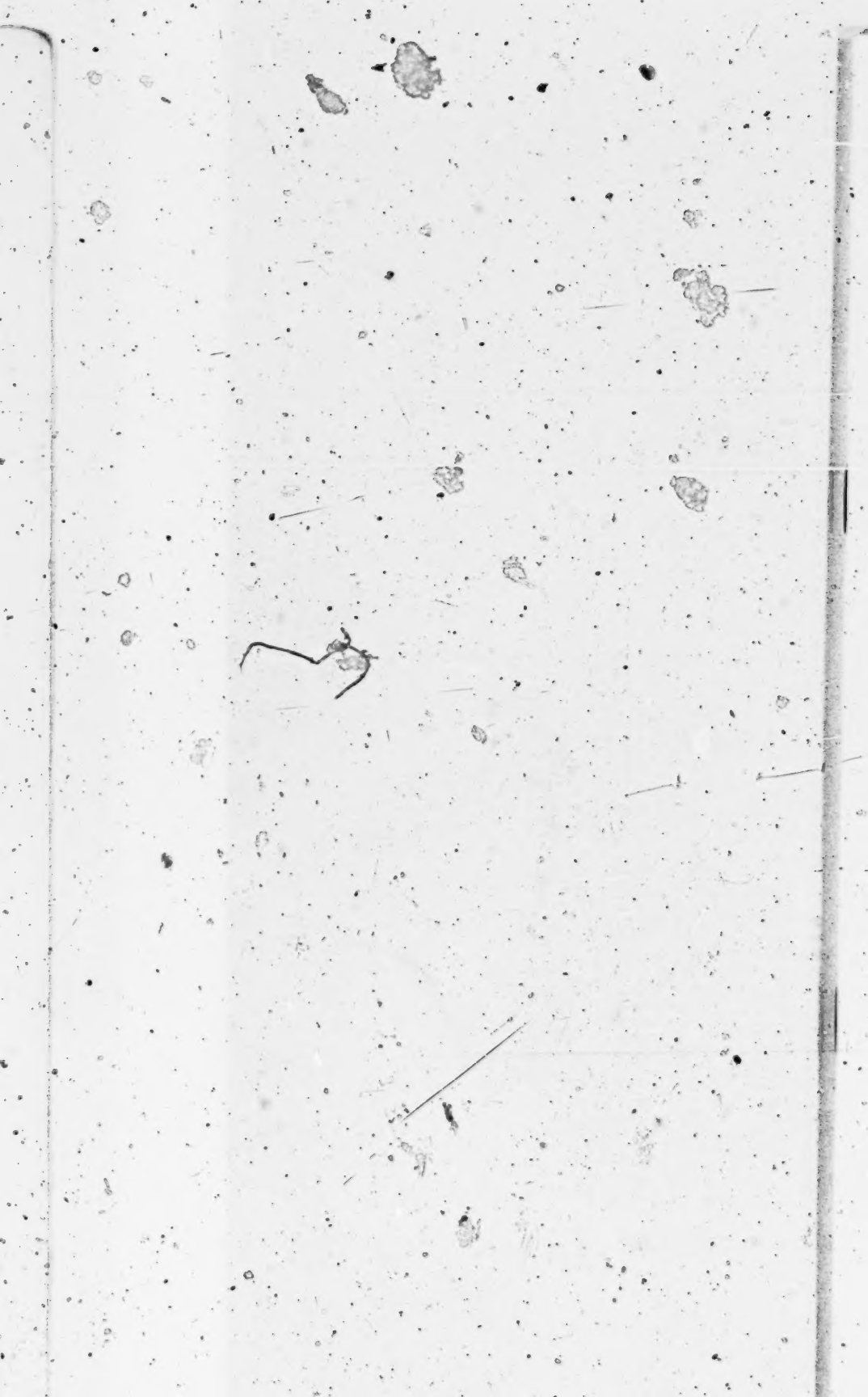

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 578

GEORGE ANGELET,

Petitioner,

—against—

HON. EDWARD M. FAY, as Warden of Green Haven State Prison,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinions of the United States Court of Appeals for the Second Circuit are reported at 333 F. 2d 12 and appear in the Record at R. 257, The opinion of the United States District Court for the Southern District of New York (Hon. Edmund L. Palmieri, *D.J.*) is not reported and is set forth at R. 249.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1). The writ of certiorari to the United States Court of Appeals for the Second Circuit was granted on October 12, 1964.

Questions Presented

I

Whether federal habeas corpus lies on behalf of a state prisoner who is now in custody pursuant to a judgment secured solely through evidence obtained in violation of the Constitution and used to secure conviction at a time when the state evidentiary rule permitted the use of such evidence and no effective federal remedy existed.

II

Whether decisions of this Court interpreting the Constitution are to be given retrospective operation.

III

Whether the participation by federal officers in the illegal search and seizure entitles Petitioner to habeas corpus relief regardless of the applicability of *Mapp* v. *Ohio*.

Constitutional and Statutory Provisions Involved

AMENDMENT IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated • • •

AMENDMENT XIV

> • • • No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2241

. . .

(c) The writ of habeas corpus shall not extend to prisoner unless

. . .

(3) He is in custody in violation of the Constitution or laws or treaties of the United States

Statement of the Case

The State Proceedings

George Angelet was tried before Judge Jonah Goldstein and jury in the former Court of General Sessions, New York County in January 1951. and convicted of possession of narcotics with intent to sell (Penal Law, §1751). He was sentenced on February 27, 1951, to ten to twenty years imprisonment, which sentence is presently being served in the custody of the Respondent. A notice of appeal to the Appellate Division, First Judicial Department was filed, but the appeal was dismissed in March of 1952 (112 N.Y.S. 2d 317).

In August 1961, the Petitioner applied to the Court of General Sessions by way of a motion in the nature of writ of error coram nobis in which it was claimed that the conviction was obtained by the use of evidence seized in violation of the Fourth and Fourteenth Amendments. The application was denied without hearing or examination of the trial record, the Court (Davidson, *J.*), "conceding *arguendo* that the evidence which resulted in petitioner's conviction was obtained as the result of an unlawful search" indicated that the failure to object or move to suppress was a waiver and held that *Mapp* was prospective only. *People* v. *Angelet*, 221 N.Y.S. 2d 834. On appeal to the Appellate Division, First Department the order denying coram nobis relief was affirmed without opinion. (18 A.D.

2d 649, 235 N.Y.S. 2d 828.) The brief filed by the District Attorney of New York County in opposition argued only one point: that coram nobis could not substitute for an appeal from the judgment and collateral relief was unavailable to attack a conviction based upon an alleged unconstitutional search and seizure. (District Attorney's Brief; R. 231 through R. 236.) Leave to appeal to the New York Court of Appeals was denied by Judge Fuld on February 8, 1963 and petition for writ of certiorari denied June 17, 1963 (374 U.S. 839). The petition to the District Court followed.

The Search and Seizure

An exhibit before the District Court was the transcript of Petitioner's trial (R. 17-R. 219). Judge Palmieri assumed *arguendo* that the search was unlawful and stated (at R. 250), "The minutes of trial, in fact, contain nothing to the contrary."

The minutes of trial indicate, by People's witnesses, that Detectives Mendel Schein and Thomas O'Brien went to defendant's third floor "walk-up" apartment at 527 West 134th Street at approximately 12:15 in the afternoon of December 21, 1950 (R. 31). As they arrived the door opened, a painter walked out and they walked in. After entering they saw Angelet seated at a table with an old woman (R. 31-32). O'Brien said to Angelet, "I hear you have a load of stuff up here and a gun." After Angelet's denial, O'Brien said:

> "If you have it you might as well give it to us because we're going to look for it, and we'll eventually find it."

Angelet was taken to the bedroom and told,

> "You sit here in the bedroom, and we're going to start right here. We'll search right from here" (R. 33).

While O'Brien was searching, Schein spoke to "different people" in the apartment—the defendant's wife and young children (R. 33). Schein also called federal narcotics agents (R. 38).

Detective O'Brien searched through the prisoner's silverware, glasses, inside a chifferobe, through "quite a number of clothes," "searched through all the shoes," through a number of baskets (R. 33) and finally, in a dresser found a quantity of money, empty cellophane envelopes, empty capsules, a stapling machine, a box of staples and a scale (R. 34-37).[1] Federal Agents Fitzgerald and Ferro arrived at about 1:15 p.m. (R. 38, 85). Fitzgerald said "Hello" to Angelet and the two Agents began to search the apartment (R. 86). Fitzgerald found four envelopes containing heroin and cocaine capsules (R. 39, 87) and a jug of milk sugar (R. 87). Detective O'Brien "took the evidence away" from Fitzgerald (R. 87). Fitzgerald testified he was an attorney (R. 96), on duty as an Agent of the Bureau of Narcotics (R. 85), that he and Agent Ferro went there in response to a telephone call from Detective Schein and that they were there to "assist in the search" (R. 91). Fitzgerald made no notes because ". . . this case was not being prosecuted in federal court" (R. 93). Fitzgerald knew that, ". . . under Federal law if you went in without a warrant, the evidence would not be admissible." Objection by the District Attorney to further questions along this line was sustained by the court (R. 101).

Angelet was a partial cripple, his left side and part of his right having been paralyzed in an automobile accident in 1949 (R. 73, 76, 162) and prior gunshot wound (R. 164). After his arrest he was treated a number of times by prison authorities for "pain" (R. 164).

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[1] O'Brien testified that these items, except the money, were narcotics sellers' paraphernalia (R. 52).

All of the items of real evidence referred to above was received in evidence. No objection was taken except with regard to the cocaine.[2]

After the narcotics were found there was a discussion about the prisoner becoming an informer. Finally O'Brien said:

> "All right George, you're under arrest. You better get dressed and put your clothes on" (R. 45).

They left the apartment at 1:30 p.m. (R. 46), one hour and fifteen minutes after O'Brien and Schein entered the premises.

ARGUMENT

Decisional law of past generations should not bind the present, except to the extent that its wisdom and reasoning has applicability in the current scheme of things. That Blackstone, Coke and Hale held overruling decisions to apply retrospectively does not bind us to blindly follow a rule which if found to be an anachronism should be now abandoned.

On the other hand the reluctance to reach a possibly undesired result should not cause the discarding of sound principles, particularly if the principles involved are not merely substantive or procedural rules, but rather integral parts of the common law jurisprudence.

The common law rule clearly is that overruling decisions apply retrospectively. As applied to courts of the United States this precept is grounded first on the view that courts do not "make" law, but merely discover or declare what

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[2] We concede that the objection was not taken on grounds here relevant.

has always been the law. Secondly, it is based on the federal constitutional limitation which prevents the rendering of an advisory (e.g. prospective) opinion.[3] *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26. As there stated, the federal power " . . . is to correct wrong judgments, not to revise opinions." Thus this Court, beginning with Chief Justice Marshall, has uniformly held overruling decisions to apply retrospectively; that is, any case properly before the Court would be decided on the basis of the then existing or declared legal doctrines.[4]

Cases which superficially appear to depart from this principle are merely the result of the application of a paramount rule or requirement of law. The most significant of the doctrines seemingly preventing retrospective operation is *res judicata*.[5] Thus in *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940), this Court refused to permit a party to reopen a final judgment in a civil proceeding where subsequent to judgment the Court held unconstitutional the statute upon which the jurisdiction of the District Court was based. Speaking for a unanimous Court, Chief Justice Hughes stated:

> "Without attempting to review the different classes of cases in which the consequences of a ruling against validity have been determined in relation to the particular circumstances of past transactions, we appro-

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[3] This constitutional limitation on federal power has no application to state courts who may render advisory opinions if they so choose and who need not even follow or accept the common law as the philosophical basis of state law. *Great Northern R'way* v. *Sunburst Oil & Rfg. Co.*, 287 U.S. 358 (1932).

[4] E.g., *United States* v. *Schooner Peggy*, 1 Cranch 103 (1801); *Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349, 372 (Holmes, J., dissenting); *James* v. *United States*, 366 U.S. 213, 225 (Black, J., concurring); *Eskridge* v. *Washington*, 357 U.S. 214.

[5] See, Snyder, *Retrospective Operation of Overruling Decisions*, 35 Ill. L. Rev. 121 at 149 (1940).

priately confine our consideration to the question of *res judicata* as it now comes before us. (308 U.S. at 374-75)

* * *

"Their determinations of such questions, while open to direct review may not be assailed collaterally (at 376)

* * *

"The [District] Court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is *res judicata* in a collateral action." (at 377)

* * *

The Court was careful to note that the prior judgment bound only the parties to the judgment by *res judicata;* clearly implying that other persons not parties to the judgment would not be so bound because *res judicata* did not apply to them.

Other overriding rules or prohibitions, such as the constitutional limitation on the power to impair the obligations of contract likewise may prevent application of the precept of retrospectivity. And in *James* v. *United States,* 366 U.S. 213 the Court held reliance on prior overruled decisions negated the criminal intent necessary for conviction of crime.

These limitations on the retrospective application of "new" law serve practical needs of major proportions, yet the limitations are within the framework of the common law heritage and reaffirm Chief Justice Marshall's statement that,

"It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns

> . . . the court must decide according to existing laws and if it be necessary to set aside a judgment, rightful when rendered but which cannot be affirmed but in violation of law, the judgment must be set aside." *United States v. Schooner Peggy,* 1 Cranch 103, at 110.

The criticism is made that the rule of retrospectivity is unrealistic, based upon the fiction that judges do not make law but merely find and declare it. We are urged to abandon this because it does not square with the realities of the judicial process.[6] However damning the appellation "fiction" may be in other areas, fictions play an essential and creative role in both legal theory and the day to day operation of the judicial process.[7] How many vessels are "unseaworthy" because a bag of beans has split open? How many defendants actually "receive" service of process published in the New York Law Journal? And how many jurors will blot from their minds excluded evidence and follow implicitly a judge's charge?

The fiction that judges do not make law stems from both common law and constitutional limitations on the power of the judiciary. Where lies legislative power if the courts now declare the power to make law? No clearer recognition could be had of judicial usurpation of legislative prerogative than to now abandon the principles which have preserved the Judicial Branch from Legislative and Executive challenge. The power to make law is vested solely in the Congress but to avoid judicial impotence where change is needed, the fiction of the declaratory concept evolved.[8]

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[6] See, e.g., *Griffin* v. *Illinois,* 351 U.S. 12 (concurring opinion, Frankfurter, *J.*), Bender, *The Retroactive Effect of an Overruling Constitutional Decision; Mapp* v. *Ohio,* 110 U. Pa. L. Rev. 650 (1962).

[7] Fuller, *Legal Fictions,* 25 Ill. L. Rev. 363, 513, 865 (1930-31).

[8] Fuller, *id.,* at 542.

Before arriving at the question of whether these principles should now be abandoned—and at what cost—closer examination must be made of other existing legal principles to see if any prevent the Court from enquiring into the legality of Petitioner's conviction and present detention.

Res Judicata

In the typical case where error of non-constitutional dimensions has occurred in the course of a criminal trial the only remedy is by direct appeal. If no appeal is taken or after appellate remedies have been exhausted a later decision should overrule a precedent under which a prisoner was convicted, there is no remedy available by which the prisoner can reopen his case and have the issue relitigated. For if the error was of a non-constitutional variety, habeas corpus will not lie. *Sunal* v. *Large,* 332 U.S. 174 (1947); *United States* v. *Sobell,* 314 F. 2d 314 (2d Cir.), cert. den., 374 U.S. 857 (1963), *Waring* v. *Colpoys,* 122 F. 2d 642 (D.C. Cir.), cert. den., 314 U.S. 678 (1941).

In those cases the respective courts found the alleged trial errors, claimed under cases decided subsequent to the termination of proceedings, did not touch upon constitutional rights of the petitioners. Since no constitutional rights were involved the Writ was unavailable. Although Judge Vinson in *Waring* spoke in terms of *res judicata,* the use of the term was inaccurate as it does not apply to *habeas* proceedings. Therefore cases such as *Chicot County Drainage District, Waring* v. *Colpoys, Sunal* v. *Large,* and *Sobell* cannot control here.[9]

[9] Compare: *Chicot County Drainage District* v. *Baxter, supra,* with *Bowen* v. *Johnston,* 306 U.S. 19 (1939). In the latter case Chief Justice Hughes, again speaking for a unanimous Court, held habeas corpus available for the claim which could not be raised collaterally in *Chicot.*

Waiver

The failure to assert the claim at trial or on appeal cannot preclude petitioner from the assertion in this forum of the denial of constitutional right.

As to the failure to assert the claim at trial, there is no waiver because even under New York law there is no forfeiture by failure to object. N.Y. Code of Criminal Procedure, §527; *People* v. *Kelly*, 12 N.Y. 2d 248 (1963); *Jongebloed* v. *Erie Railroad Co.*, 296 N.Y. 912 (1947). The necessity of an objection is a rule limiting only the peculiar, discretionary jurisdiction of the New York Court of Appeals and is not one which limits the power of the one court to which a defendant has an appeal of right. Compare: *People* v. *Piazza*, 15 A.D. 2d 503 (2d Dept., 1961) with *People* v. *Friola*, 11 N.Y. 2d 157 (1962). But see, *People* v. *West*, 12 N.Y. 2d 1090 (1963).

But regardless of New York law the question of waiver is a federal one and to be applicable must flow from a conscious abandonment of a known right. To say that Angelet—or his counsel—knew or should have known of the defendant's right to be tried free from the tainted evidence is manifestly absurd. The highest court of New York had denied the existence of the right (*People* v. *Defore*, 242 N.Y. 13) and this Court, less than two years prior to Angelet's trial, had held no federal remedy to be available to protect the federal right involved. *Wolf* v. *Colorado*, 338 U.S. 25 (1949). To require objection and appeal in the face of two controlling decisions is to place a premium on the attorney who performs frivolous acts.[10] The cross-

[10] See, Judge Learned Hand's opinion in *U.S. ex rel. Kulick* v. *Kennedy*, 157 F. 2d 811, reversed, sub nom. *Sunal* v. *Large*, 332 U.S. 174. Judge Hand held that counsel's reliance on the uniform decisions of two circuits and the denial of certiorari in one case was reasonable and "made any appeal so obviously fruitless as to excuse taking one." In reversing, this Court specifically reaffirmed

examination of Agent Fitzgerald by Angelet's counsel shows that he recognized his client's rights had been violated but knew he had no remedy whereby it could be asserted (R. 101).[11] Rules relating to waiver must be reasonable; one which requires clairvoyance is not. The test of forfeiture to be applied is:

> "If a habeas corpus applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claim in the state courts, *whether for strategic, tactical or any other reason that can fairly be described as the deliberate bypassing of state procedures,* then it is open to the federal court to deny him all relief if the state courts refuse to entertain his federal claim on the merits.
>
> * * * * *
>
> "[The choice not to appeal] cannot realistically be deemed a merely tactical or strategic litigation step, or in any way a deliberate circumvention of state procedures." *Fay* v. *Noia,* 372 U.S. 391 at 439 (emphasis added).

Had Angelet been convicted after *Mapp,* not raised the question in the state courts, and immediately sought habeas

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that the denial of certiorari meant nothing beyond the particular case and reliance therefore was unjustified. It was also held that the legal question involved was non-constitutional and thus could not be raised collaterally. See also, *U.S. ex rel. Campbell* v. *Rundle,* 327 F. 2d 153 at 160 (3rd Cir., 1964); *U.S. ex rel. Carafas* v. *LaVallee,* 334 F. 2d. 331 (2d Cir., 1964), cert. pending, No. 442, O.T. 1964.

[11] It would appear that under New York law the interrogation of Agent Fitzgerald, which was aborted by the sustaining of the prosecutor's objection, would be sufficient as an objection. See, *People* v. *O'Neill,* 11 N.Y. 2d 148 (1962). Compare, *Jackson* v. *Denno,* 378 U.S. 368 (1964).

corpus it might fairly be suggested that he deliberately bypassed the state system in order to obtain an immediate federal adjudication of his claim. Clearly the prisoner did not deliberately withhold the federal question from the New York courts. The fourteen years he has waited in prison refute any suggestion of a calculated waiver.

Reliance

We anticipate that the Respondent will urge that petitioner should not here prevail because in 1950 the State of New York may have relied upon *Wolf* v. *Colorado* in prosecuting him through use of the products of the invasion of his home. Since habeas corpus is to some extent governed by equitable principles,[12] consideration should be given to any *legitimate* reliance by the State. But can the State have legitimately relied upon *Wolf*—relied to the extent that it would be inequitable to now release George Angelet from the ten to twenty years sentence he "owes" the State of New York?

When Detectives O'Brien and Schein entered George Angelet's apartment they committed a crime; when they searched his apartment they were guilty of oppression and violated 18 U.S.C. §§241-242. Under New York Law they had acted illegally; in fact they were liable for damage in a civil action. *Doane* v. *Anderson*, 60 Hun 586, 15 N.Y.S. 459; *People* v. *Defore*, 242 N.Y. 13, cert. den., 270 U.S. 657 (1926). They were guilty of violation of the federal Civil Rights Statute, 42 U.S.C. §1983. As to the federal officers, their disregard of their duty and violation of law is *a fortiori*, even though, as Agent Fitzgerald put it, "this case was not being prosecuted in federal court."

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[12] *Fay* v. *Noia*, *supra*, at 438; *U.S. ex rel. Smith* v. *Baldi*, 344 U.S. 561, 573 (dissenting opinion).

In short they knew they were acting illegally but did so because they thought they could get away with it.

This is not the kind of case referred to by Judge Cardozo in *People* v. *Defore, supra,* where "the prisoner is to go free because the constable has blundered.". There was no "blunder" here. We have conduct which evidences not a technical mistake, but rather an arrogance, defiance of law and disregard of human dignity such as should give Respondent no equitable standing in this or any Court.[13]

The Effect of Retrospective Application

Assuming a latitude of choice, the Court should consider the effect generally of a decision requiring retrospective application.

One factor to be considered is the number of persons affected. It has now been over three and one-half years since *Mapp* was decided, yet to our knowledge less than a dozen cases have presented records which conclusively demonstrate that evidence obtained as the result of an illegal search and seizure was used in a state court trial.[14]

In view of the notoriety attending the *Mapp* decision this dearth of petitions—*pro se* or otherwise—forecasts that retrospective application threatens no "general goal delivery."

In his monograph, "A Comment on The Law of Search and Seizure," Judge Nathan R. Sobel of the New York Supreme Court noted:

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[13] Compare: *Rochin* v. *California*, 342 U.S. 165 (1952).

[14] *Hall* v. *Warden*, 313 F. 2d 483 (4th Cir.), *cert. den., sub nom. Peppersack* v. *Hall*, 374 U.S. 809 (1963); *Walker* v. *Peppersack*, 316 F. 2d 119 (4th Cir. 1963); *Linkletter* v. *Walker*, No. 95, O.T. 1964 (323 F. 2d 11); *California* v. *Hurst*, No. 45, O.T. 1964 (325 F. 2d 891); *Eastman* v. *Fay*, No. 415 Misc., O.T. 1964 (225 F. Supp. 677, reversed 333 F. 2d 28); *Sisk* v. *Lane*, 331 F. 2d 235 (7th Cir., 1964).

"Since concern, if not consternation, followed the *Mapp* ruling, I have re-examined the trial record of 150 trial verdicts in my part since January, 1960. That investigation discloses that an issue of unlawful or unreasonable search might have been raised in 14 such cases. Twelve were 'contraband' cases; one was a receiving charge, another was a burglary charge. A re-examination of 850 pleas of guilty during that same period from 'Description of Crime' in the probation reports, discloses that the same percentage holds true both as to number of issues and categories of crime. And, to be noted, is that exclusion of the evidence would not have been determinative of the issue of guilt or innocence in *all* cases. Other evidence existed in some."

Thus in a thousand cases we have indication that in fourteen the issue of unreasonable search and seizure *might* have been raised.[15] Presumably untainted convictions could be obtained in some of these cases if a new trial were ordered. Also, presumably, some of these defendants have already completed service of their sentences.

Of course the major consideration must be that George Angelet is now in prison solely because of the violation in 1950 and at present of his rights under the Federal Constitution.

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[15] The claim cannot be raised in the guilty plea cases. *Alexander* v. *United States*, 290 F. 2d 252 (5th Cir., 1961); *Broadus* v. *Lowry*, 245 F. 2d 304 (6th Cir., 1957); *Winston* v. *United States*, 224 F. 2d 337 (2d Cir., 1955). See, *United States* v. *Miller*, 293 F. 2d 697 (2d Cir., 1961) involving a Mallory claim raised under Section 2255 after a plea of guilty. Chief Judge Lumbard wrote, "The sentence was based on the plea and not on the evidence."

POINT I

Petitioner's Custody Under a Judgment Secured Solely Through Evidence Which Was the Product of an Illegal Search and Seizure Is in Violation of the Constitution Regardless of the State Evidentiary Rule Prevailing at Time of Judgment or the Former Absence of an Effective Federal Remedy.

The Constitution has always provided that an unreasonable search and seizure by state or Federal officers was a violation of the rights of the person aggrieved. *Wolf* v. *Colorado* did not make lawful "state" searches without warrant or probable cause nor did *Mapp* make them illegal.[16] All *Wolf* held was that no federal remedy existed in the criminal proceedings in which the fruits of the unlawful conduct were offered. Thus the *Wolf* Court, by permitting suit to be brought under the Civil Rights Act, recognized that a right had been then violated. *Wolf* v. *Colorado*, 338 U.S. at p. 30, n. 1.

In *Mapp* the Court declared that this civil remedy was ineffective to protect the right and expanded Federal remedies to directly affect the state proceeding in which the violation of right was perpetuated.

Arguments advanced against the retrospective application of *Mapp* fail to recognize that the Court has not created a new right but merely removed a procedural bar to the assertion of an existing one. See, *Hy-Yu-Tse-Mil-Kin* v. *Smith*, 194 U.S. 401 (1904). The search and seizure here was just as unlawful in 1950 as it would be today.

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[16] In *Elkins* v. *United States*, 364 U.S. 206, at 213 the Court said:

> "[In *Wolf*] it was unequivocally determined by a unanimous Court that the federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers."

It has been suggested that the right vindicated by *Mapp* falls into some lesser category of protection than other rights secured by the Constitution. Therefore the retrospective application given to cases dealing with the right to counsel, the right to a free appellate transcript, and the right to be tried free from involuntary confessions are said not to control here because only the "obviously guilty" are convicted under illegally seized evidence. We believe that this argument is in reality an argument against *Mapp* v. *Ohio* itself, and lies as the cornerstone of those decisions refusing to give full scope to the Fourth Amendment rights of convicted persons.

Argument has also been made that the purpose of *Mapp*, claimed to be deterrence of official oppression, can be served by limited retrospectivity (i.e., application to future conduct and cases pending and within the judicial process on the date of *Mapp* decisions).[17] Aside from the fact that this limited retrospectivity is equally inconsistent with the assumed "deterrence" purpose of *Mapp* as would be complete retrospectivity, the premise cannot stand close inspection.

The right of privacy secured against state action is "a right basic to a free society" (*Mapp*, at 656), and is equated by the Court with the right to be tried free from an involuntary confession (*Mapp*, at 656-657). The right is one which accrues to the person aggrieved and, although repeated and wilful violation of the right by others has provided incentive for fashioning particular remedies, it remains the right of the injured which is secured and not the disability of the violator which is condemned.

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[17] Bender, *op. cit.*; *supra*, note 6; *Linkletter* v. *Walker*, *supra*, note 14; Compare: *People* v. *Loria*, 10 N.Y. 2d 368 (1961), with *People* v. *Muller*, 11 N.Y. 2d 154, *cert. den.*, 371 U.S. 850 (1962); *United States ex rel. Carafas* v. *LaVallee*, *supra*, note 10.

While we of course recognize that deterrence of official misconduct to a greater or lesser extent provided the impetus for the overruling of *Wolf*, we suggest that the courts in *Linkletter* and *Angelet* have overlooked the fact that the rule of exclusion is the law, not that the purpose of the rule is the law.

By focusing upon the deterrence aspect of the Fourth Amendment in its opinion in *Mapp* we do not believe the Court meant to suggest that this was the basis for the overruling of *Wolf*. To interpret *Mapp* as elevating to legal significance the "deterrence aspect" is to completely reject the line of cases holding that the good faith of the searching officers is not enough to support an unreasonable search, *Director General of Railroads* v. *Kastenbaum*, 263 U.S. 25, 28 (1923); *Henry* v. *United States*, 361 U.S. 98, 103 (1959), and the cases holding that regardless of the extent of official misconduct, a defendant has no standing to demand suppression unless his personal rights were violated and he "belongs to the class for whose sake the constitutional protection is given." *Jones* v. *United States*, 362 U.S. 257, 261 (1960). Such rulings are meaningless if it is deterrence which is commanded and not the right which is protected by the Constitution.

POINT II

All Decisions of the Supreme Court Interpreting the Constitution Are Retrospective in Scope.

The general rule has always been that overruling decisions apply retroactively. It rests upon the view, authoritatively set forth by Blackstone that the power of common law judges is to determine what the pre-existing law is and then declare it.[18] Blackstone knew that judges changed their rulings on points of law but this did not, to him, indicate any lawmaking function on their part:

> ". . . but even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared not that such a sentence was bad law but that it was not law . . ." 1 Blackstone, *Commentaries*, *70.

Thus the overruling decision impeaches the validity of the prior decision as evidence of what the law was. Except in the cases where other supervening principles prevent its application,[19] the courts of the United States have heretofore held overruling decisions to apply retrospectively. See, e.g., *Sunray Oil Co.* v. *C.I.R.*, 147 F. 2d 962 (10th Cir.), *cert. den.*, 325 U.S. 861 (1945); *Massaglia* v. *C.I.R.*, 286 F. 2d 258 (10th Cir., 1961); *County of Los Angeles* v. *Faus*,

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[18] The rule requiring retrospectivity is not necessarily dependent upon the Blackstonian theory. It can be justified as in accord with the concept that the function of a common law court is to render a legal decision as to the consequences of facts which have already occurred while the function of the legislature is to make rules that apply only prospectively.

[19] *Supra*, pp. 10-15.

48 Cal. 2d 672, 312 P. 2d 680, 685-686 (1957); *Peerless Electric Co.* v. *Bowers*, 164 Ohio St. 209, 129 N.E. 2d 467 (1955); *Texas Co.* v. *Oklahoma Tax Comm.*, 249 P. 2d 985 (Okla. 1952); *Mickel* v. *New England Coal & Coke Co.*, 132 Conn. 671, 47 A. 2d 187 (1946); *Laabs* v. *Wisconsin Tax Comm.*, 218 Wis. 414, 261 N.W. 404 (1935); 14 Am. Jur., *Courts*, §130; 21 C.J.S., *Courts*, §194.

The first substantial attack on the principle of retrospective overruling came in 1932 from (then) Chief Judge Cardozo of the New York Court of Appeals. He advocated that a court faced with an antequated and unjust rule upon which a party had justifiedly relied, should not overrule a precedent in a manner which would cause real injustice to that party.[20]

Although this proposal has been rejected by New York,[21] it has been accepted elsewhere and we will not attempt to refute its general soundness.[22]

However, the emphasis of the proposal and its proponents has been upon legitimate or justified reliance and

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[20] Address by Chief Judge Cardozo to the New York State Bar Association, January 22, 1932, 55 Report of N.Y.S.B.A. 263, 294-296 (1932). In *Great Northern Ry.* v. *Sunburst Oil & Rfg. Co.*, 287 U.S. 358 (1932) he further limited his proposal to non-constitutional cases.

[21] *Cammack* v. *Slattery & Bro.*, 241 N.Y. 39, 46 (1925); *People ex rel. Rice* v. *Graves*, 242 App. Div. 128 (3rd Dept., 1934), *aff'd* 270 N.Y. 498, *cert. den.*, 298 U.S. 683 (1936). Judge Van Voorhis has called it, "an interesting suggestion which has not been adopted, though it has often been discussed." Van Voorhis, *Cardozo and the Judicial Process Today*, 71 Yale L.J. 202, 205 (1960); see also, Fuld, *The Commission and the Courts*, 40 Cornell L.Q. 646-647 (1955) where, in discussing the preferability of change by legislation rather than judicial decision, Judge Fuld states, ". . . any change made by the courts would necessarily be retroactive in its operation."

[22] 21 C.J.S., *Courts*, §194(b).

unwillingness to cause substantial injury to a party who has merely done what the courts previously said was permissible.[23] New York lacks equitable standing to claim reliance on the overruled decision and certainly cannot claim injury.

Another, and more basic, limitation on the application of the prospectivity proposal, equally applicable to limited retrospectivity or "selective prospectivity" is that we are not here dealing with the overruling of an interpretation or declaration of the unwritten common law. Our case rests not on Blackstone or the common law, but on the Constitution, and,

> "However the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decison of the Court."[24]

Thus Cardozo, the leading proponent of non-retrospective overruling and the rejection of the Blackstonian view, while an Associate Justice of this Court limited his proposals to non-constitutional claims or causes.[25]

Close analysis of this Court's opinion in *Great Northern* v. *Sunburst, supra,* demonstrates that it provides no comfort to the Respondent. In that case a shipper had brought suit against a carrier to recover allegedly excessive rate

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[23] Cardozo, *The Nature of the Judicial Process* (Yale Press, reprint, pp. 146-149).

[24] Warren, *The Supreme Court in United States History,* vol. II, pp. 748-49 (Rev'd Ed. 1926) in which he quotes from *The Works of George Bancroft* (1852), IV, 549, "To the decision of an underlying question of constitutional law no . . . finality attaches. To endure, it must be right."

[25] *Great Northern* v. *Sunburst,* 287 U.S. 358 (1932). Actually the case does not even stand for the proposition that a *federal* court has the power to overrule prospectively in a non-constitutional case. See, note 3, *supra.*

charges made in conformity with a tariff schedule approved by the State Board of Railroad Commissioners. The suit was brought under a 1921 Montana Supreme Court decision which held that a shipper might sue the carrier because of excessive rates notwithstanding the fact that the rate had been approved by the Commission. At the time of the disputed transaction between the parties, the 1921 case was "the law" and there was, " . . . notice to all concerned that payments exacted by a carrier . . . were subject to be refunded if found thereafter . . . to be excessive." *Great Northern, supra,* at 362. Sunburst then brought suit and recovered on the basis of the 1921 decision. Upon appeal, the Montana Supreme Court affirmed the recovery but announced that for future transactions the rates established by the Commission would be incontestable.

Justice Cardozo's opinion merely states that there was no federal inhibition upon the state court's choice to overrule its 1921 decision prospectively and yet apply the earlier decision to those who "had acted on the faith of it." He further qualified this by an enquiry into whether the carrier's constitutional rights had been violated by either the trial court's reliance upon the earlier case or the Supreme Court's adherence to the old rule on the case before it at a time when it announced that it would not follow it for future transactions. Cardozo held that neither of the inconsistent rulings on tariff contestability affected any constitutional right of the carrier. Actually had the Montana court applied the new law retrospectively the shipper would have been in a position to complain that retrospective operation ran afoul of the constitutional limitation upon the impairment of contractual obligations.

Analysis of both the writings and opinions of Justice Cardozo indicates no more than his belief that state courts may, if they so choose, overrule prospectively in cases

where neither the "old" nor "new" law affected constitutional rights and where prospective application would be the only way of preventing injustice to the party who had legitimately relied upon the prior law. Not one of the considerations which motivated Cardozo to reject Holmes' "thousand years [of retrospective operation]" is present in this case.[26]

POINT III

Regardless of the Applicability of Mapp v. Ohio to the Conduct of the State Officers, the Participation by Federal Officers Entitles Petitioner to Federal Relief.

The conduct of the federal agents in the search of Angelet's home was a clear and wilful violation of then existing federal law. Even under *Wolf*, Fitzgerald's testimony was proscribed. *Rea* v. *United States*, 350 U.S. 214 (1956).[27] The policy considerations which dictated the injunctive relief in *Rea* are equally applicable to federal habeas corpus relief after the tainted testimony and evidence have been adduced at trial.

Conclusion

This case presents no question of judging past actions by present standards of conduct; rather we are dealing with the question of whether a present remedy may be invoked to cure a constitutionally intolerable evil; inexcusably wrong when perpetrated and perpetuated by each day of future imprisonment.

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[26] *Kuhn* v. *Fairmont Coal Co.*, *supra*; note 4.

[27] Although *Rea* is also a "subsequent" decision, it is not an overruling one. The Court's opinion treat the disposition as completely consistent with *Wolf*.

For the foregoing reasons the judgment of the Court of Appeals for the Second Circuit should be reversed and the case remanded to the district court with directions to sustain the writ of habeas corpus.

Respectfully submitted,

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